Supreme Court, U.S.
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No. 06-591

In The

Supreme Court of the United States

MICHAEL S. WHITNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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August, 2006

QUESTION PRESENTED

Did Whitney make a knowing and intelligent waiver of counsel? Was Whitney denied his constitutional Sixth Amendment right to conflict-free counsel? Did the district court deprive Whitney not only of his paid counsel of choice, but counsel altogether at the most critical stage, his trial?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael S. Whitney, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit holding viewing the record as a whole, Whitney's waiver of counsel was knowing and intelligent. Also "a mere theoretical division of loyalties" does not show a violation of Attorney Conflict of Interest.

OPINION BELOW

The opinion of the Court of Appeals, Ninth Circuit, is unpublished but appears in Appendix "A" to this petition as *U.S.A. v. Michael S. Whitney,* Case No. CA 05-50323.

The opinion was filed on May 12, 2006. Petitioner, filed a petition for rehearing with suggestion for rehearing en banc, the petition was summarily denied on June 21, 2006. A copy of that order is attached hereto as Appendix "B."

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and pursuant to the Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the United States Constitution, Federal Rules of Criminal Procedure, Rule 44(c), is set forth in Appendix "C."

STATEMENT OF THE CASE

The United States District Court, Central District of California, had jurisdiction pursuant to Title 18 U.S.C. § 3231. The United States Court of Appeals, Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioner was charged with mail fraud and aiding and abetting in violation of Title 18 U.S.C. § 1341, 2 respectively. (ER 1-9.)

The jury found petitioner guilty as charged. (CR 224.) On January 26, 2004, the district court denied petitioner's motions for a new trial and for acquittal. (RT 1/26/04 1-74, ER 447-524.) On February 5, 2004 petitioner filed a Notice of Appeal. (ER 596.) On October 1, 2004 petitioner filed his opening brief and excerpts of record. In November 2004, the Ninth Circuit remanded this case to the district court for a *Castro* hearing in that the district court may reconsider petitioner's sentence in light of *Blakely v. Washington,* 159 L.Ed.2d 403 (2004). On April 27, 2005, the district court conducted a resentencing hearing and sentenced petitioner to a term of 43 months. (RT 4/27/05 55, ER 651.) Petitioner filed a notice of appeal on the same day. (ER 666.) Petitioner was represented by retained counsel during pre-trial – from April 30, 2001, up to days before trial, sentencing, resentencing and appeal before the

Ninth Circuit. Petitioner is presently serving a 43-month sentence.

A. Pre-Trial

March 10, 2000, Petitioner Michael S. Whitney, as instructed by United States Postal Inspector, appeared on his own at United States District Court, Santa Ana, California.

Per 18 U.S.C. § 3006A(a)(c), Deputy Federal Public Defender Dean Steward represented Whitney at the bail hearing. (CR 11, ER 365.) Whitney believed that Mr. Steward was his attorney that day, and Whitney divulged privileged information to Mr. Steward. (ER 365.) During the proceeding, Whitney informed Mr. Steward that he did not qualify for a public defender. Mr. Steward provided names of four attorneys for Whitney to interview. These attorneys included Tom Bienert and David Wiechert. (ER 365.) On April 10, 2000, Whitney informed Magistrate Judge Nakazato he was representing himself but that he would be retaining Tom Bienert and David Wiechert. (GER 278.) Judge Nakazato inquired whether defendant had discussed the dangers of self-representation with the lawyers he expected to retain, and Whitney responded,

"correct, that's why they will be defending me."

(*Id.*)

On January 8, 2001, status conference, all parties agreed to continue the trial to November 13, 2001. (ER 73.) The district court asked Whitney whether he still intended to retain an attorney, and Whitney said he did (RT [1/8/2001] 11-3; GER 24-26.) The district court warned

Whitney that it would not postpone the trial so a newly-retained attorney could prepare, Whitney informed the court he understood. (RT [1/8/2001] 14; GER 27.) The district court further inquired about appointing counsel to represent Whitney. Whitney responded by stating no that is not a possibility. The district court asked Whitney if he was financially able to retain counsel. (RT [1/8/2001] 17; GER 30.) Whitney said "yes I am." (*Id.*) The district court confirmed that Whitney had talked to an attorney about representing him. (*Id.*) The district judge and Whitney had the following colloquy; the district judge explaining the theory of an adversary system and informing Whitney;

> "And so it's necessary that whoever represents you does the very best job possible and so that he can give a fair presentation to the jury or to the judge."

Whitney explained to the district judge;

> "I just want to make sure that when I'm sitting down with an attorney I know more about the case than he does. And I want to be able to make sure that I can have a conversation with him to make sure that he's not neglecting anything."

(RT [1/8/2001] 24-25; GER 37-38.) Shortly thereafter, the district court asked Whitney if he had any questions about representing himself. Whitney said he did not,

> "because I know it's foolish."

(RT [1/8/2001] 27; GER 40.)

The district court asked the government to monitor the situation and to schedule a status conference if the situation remained unresolved in a couple of months;

> "I want to make sure we don't have a delay in the trial"

(RT [1/8/2001] 29; GER 61.)

July 2, 2001, status conference, Attorney Thomas Bienert was present and informed the district court he had not yet been retained but expected to file an appearance as counsel of record within two weeks. (RT [7/2/2001] 4; GER 48.) Whitney informs the district court he has every intention of retaining Thomas Bienert,

> "obviously this is a new process for me to be standing here so I want to make sure that I have the proper counsel."

(RT [7/2/2001] 5-6; GER 48.)

The district court then confirmed that, if retained, Bienert would be prepared to go to trial on November 13, 2001. (RT [7/2/2001] 6; GER 49.) The district court set a further status conference for July 23, 2001, to;

> "come to a conclusion on this matter."

July 23, 2001, status conference, Bienert advised the district court,

> "he had been retained"

in order to review the discovery, and if he was retained for trial by September 1st he would be prepared to go to trial on the scheduled trial date, November 13, 2001. (RT [7/23/2001] 5-6; GER 55-56.)

October 15, 2001, status conference, after granting a motion to continue the trial until May 7, 2002, due to the unavailability of co-defendant Loretta Antrim's trial counsel, the district court cautioned Whitney again that it

would not continue the trial due to a last-minute change of counsel:

> THE COURT: Mr. Whitney, let me comment on this business of Mr. Bienert. The court has begged and pleaded with you to get Mr. Bienert into this case if you're going to do it. I am not going to get in a situation where at the last minute we get up to this date and you say to me, "well, I want to bring Mr. Bienert in and he can't be available then." That's not going to fly with the court. We're going to trial on that date. You've been given ample opportunity to get Mr. Bienert into this case and we don't see him here. What's the story? Is Mr. Bienert going to come in or what?

Whitney informed the court:

> "I have every intention of bringing him in."

(RT [10/15/2001] 15; GER 71.)

April 30, 2001, Whitney executed a retainer agreement with Thomas Bienert and David Wiechert.[1] Mr. Bienert's billing records show that at this time, he was actively preparing for trial, conferencing with the AUSA, and was retained on an hourly basis. (ER 435.) In September 2001, Mr. Bienert's billing records demonstrated that he continued to prepare for trial. He prepared a trial outline and a trial memorandum. (ER 437.)

Whitney's co-defendant Hudson's court appointed panel attorney passed away. The judge in chambers on

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[1] Mr. Bienert on July 2, 2001, he "indicate[d]" he was being retained, but was not retained counsel as of that day. (ER 367, CR 83.) Yet, April 30, 2001, is the date of the retainer agreement.

January 8, 2002, appointed panel Attorney Mr. Kenneth M. Miller to represent Hudson. (CR 105, 367.) The court record is void of the district court conducting a Rule 44(c) inquiry as required by Federal Rules of Criminal Procedure. Whitney's original attorney, Dean Steward, had left the federal public defender's office. The record confirms Mr. Miller was law partners with Whitney's original attorney, Dean Steward. (ER 379.)

Whitney called Mr. Bienert on January 10, 2003. Mr. Bienert told Whitney that he could not represent him at trial scheduled to begin on January 21, 2003, because of a calendar conflict. (ER 368.)

January 14, 2003, Whitney met with Mr. Bienert at his office. Whitney told him that he wanted to move to continue the trial to enable Mr. Bienert time to prepare. (ER 368-369.)

During this meeting, Mr. Bienert told Whitney he wanted to talk to co-defendant Hudson's counsel, Mr. Miller. Mr. Bienert asked Whitney to step outside his office. Whitney then discovered that Mr. Miller's office was located diagonally across the suite from Bienert's office. (ER 369.)

After approximately fifteen minutes, Mr. Miller left Mr. Bienert's office, and Mr. Bienert asked Whitney to step inside. Mr. Bienert then informed Whitney that Mr. Miller was prepared to go to trial immediately and did not wish to continue the trial. At this point, Whitney became concerned that Mr. Bienert was more interested in protecting Mr. Hudson's interest than his own. As a result, Whitney no longer felt comfortable with the prospect of being represented at trial by Mr. Bienert. (ER 369.) As this was only seven days before the scheduled start of trial,

Whitney believed it was too late to retain other counsel. Whitney therefore felt he had no choice but to represent himself at trial. (ER 369.)

Mr. Bienert's billing records to Whitney support Mr. Bienert was actively preparing for trial and conferencing with the AUSA. (ER 435.) Days before the trial, the government submitted their trial brief they informed the court it should conduct a *Faretta* hearing if Whitney is without counsel for the start of trial and appoint stand-by counsel. *Faretta v. California*, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975). The government said in their trial brief, it's a very important time to say,

> "wait a second. You said you wanted an attorney. Do you understand the dangers of self-representation? Do you understand why it's a foolish activity or not a wise activity to represent yourself?"

The first day of trial, January 21, 2003, the government changed its trial brief position. The government told the court,

> "We don't think there is a need for you to do a formal Faretta hearing this morning as we sit here and wait for the jury to enter the courtroom."

The following is the *Faretta* colloquy[2];

The Court:

Right, at one time, you had told the court I think – who was the attorney? was it Mr. Bienert you expected to come in at the end of the of the case?

---

[2] During the hearing on the motion for new trial, the government conceded that the district court never advised Mr. Whitney of the maximum penalties. (RT 1/26/04 20-22, ER 469-470.)

Mr. Whitney:

Yes. I expected to retain Mr. Bienert to represent me.

The Court:

Without telling me any financial details or anything, I take it that it just simply didn't work out to have him represent you?

Mr. Whitney:

No, I just simply decided that I would represent myself.

The Court:

All right. Let me just find out one other thing, because it's important that we cover this kind of thing: "Did you discuss with him the wisdom of representing yourself?" I won't ask you what the nature of those discussions were. But did you discuss that topic with him?

Mr. Whitney:

No. No, sir.

The Court:

All right. One other point on that. Would you state for the court: What is your education level? How far did you go in school?

Mr. Whitney:

Six units shy of graduating with a degree in business finance.

The Court:

This was after high school, that was in college; correct?

Mr. Whitney:

Correct.

The Court:

Where did you go to college?

Mr. Whitney:

I went to school back east in Northern Virginia, Glendale and Cal State Northridge.

The Court:

Okay. Thank you very much. I appreciate your comments.

(RT 1/21/03, 5-7, ER 11-13.)

The government suggested the court appoint stand-by counsel for Whitney. The court denied the request because it would take six months for counsel to get acquainted with the case. (RT 1/23/03.)

B. Events After Trial

After the trial was over, Whitney saw a box of documents labeled "Hudson" in Mr. Wiechert's office. Since Whitney retained Mr. Wiechert and Mr. Bienert, he became very suspicious that material relating to co-defendant Hudson was in Mr. Wiechert's office. (ER 369.)

Whitney learned that Mr. Bienert's paralegal/office manager also worked as a paralegal for the other lawyers in Mr. Bienert's suite – including Mr. Wiechert, Mr. Miller, and Mr. Steward. (ER 369.) Whitney also learned that Mr.

Bienert, Mr. Miller, Mr. Steward and Mr. Wiechert purchased a law office building together.[3] (ER 369-370.)

Based on this information, Whitney hired retained attorney Boyd S. Lemon to review the events and determine whether the attorneys had a conflict of interest.

C. Expert Opinion Of Boyd S. Lemon

Mr. Lemon in his declaration filed in the district court offered the following opinion:

> a. Mr. Miller had a conflict of interest in representing co-defendant Hudson in this case because his partner, Mr. Steward, had previously represented Mr. Whitney in the same case.
>
> b. Mr. Wiechert and Mr. Bienert had a conflict of interest in rendering legal services to Mr. Whitney in this case, while their associate Mr. Miller and apparently Mr. Wiechert himself were rendering legal services to Mr. Whitney's co-defendant, Mr. Hudson.
>
> c. All of the attorneys had a conflict of interest in practicing law together, including using the same legal assistance, while Mr. Bienert was representing Mr. Whitney and Mr. Miller was representing co-defendant Hudson.
>
> d. This conflict of interest deprived Mr. Whitney of effective counsel, because he did not become suspicious of a conflict until it was too late to retain counsel other than Mr. Bienert before

[3] The law office building transaction took place during the latter part of pre-trial and throughout Whitney's trial.

trial, and was therefore forced to represent himself (ER 381-382.)

Whitney filed a motion for a new trial and argued that his Sixth Amendment right to effective and conflict free counsel was violated based upon Mr. Lemon's findings. The trial court found that no conflict existed and denied the motion. (RT 1/26/04 63-64, ER 512-513.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that the United States Court of Appeals, Ninth Circuit, has sanctioned the violation of the core purpose of the Counsel Clause guarantee embodied in the Sixth Amendment of the United States Constitution.

(1) Issue One:

Did Whitney make a knowing and intelligent waiver of counsel? Was Whitney denied his constitutional Sixth Amendment right to conflict-free counsel? Did the district court deprive Whitney not only of his paid counsel of choice, but counsel altogether at the most critical stage, his trial?

The events leading up to trial clearly demonstrate Whitney had no intention of self representation. Whitney repeatedly and unequivocally informed the court during different status conference hearings he would be retaining Mr. Thomas Bienert and Mr. David Wiechert as his counsel.

On April 30, 2001, Whitney executed a retainer agreement with Mr. Thomas Bienert and Mr. David Wiechert. At the July 23, 2001, status conference, Mr. Thomas Bienert appeared before the district court, and he informed the court on the record: "he had been retained."

As of this date, Whitney's co-defendant's present court appointed counsel was not laboring under a conflict with Whitney's retained counsel. Whitney's retained attorney, Mr. Thomas Bienert, billing records show that he was actively preparing for trial, conferencing with the AUSA, and was retained on an hourly basis. (ER 435.) In September 2001, Mr. Bienert's billing records demonstrate that he continued to prepare for trial. He prepared a trial outline and a trial memorandum. (ER 437.)

Whitney's co-defendant's court appointed counsel passed away unexpectedly. On January 8, 2002, the district court judge in chambers appointed Mr. Kenneth M. Miller to represent co-defendant Hudson. (CR 105, ER 367.)

Under Federal Criminal Rules of Procedure, Rule 44(c), the district judge was required to conduct a Rule 44(c) inquiry before he appointed Mr. Kenneth M. Miller to represent co-defendant Hudson. At sentencing the judge stated all four attorneys: Mr. Bienert, Mr. Wiechert, Mr. Miller and Mr. Steward, were well known to the court.

Rule 44(c) instructs: "Avoiding a conflict-of-interest situation is in the first instance a responsibility of the attorney." Mr. Thomas Bienert and Mr. David Wiechert not only had a contractual obligation by the terms of their retainer agreement with Whitney to disclose any material information that might come about. Messrs. Bienert and Wiechert were obligated by the Code of Professional Responsibility, Ethical Considerations 5-15, to "resolve all doubts against the propriety of the representation" of conflicting interests.

Also under ABA standards relating to the defense function § 3.5(b) (Approved Draft, 1971), concluding that

the "potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

Mr. Bienert and Mr. Wiechert remained silent not only to Whitney, they remained silent also to the district court about their relationship with Mr. Steward and Mr. Miller; Mr. Bienert and Mr. Wiechert continued to bill Whitney's trust account.

> "The Constitution protects defendants whose attorneys fail to consider, or choose to ignore, potential conflict problems."

Holloway v. Arkansas, 435 U.S. 475, 55 L.Ed.2d 426, 98 S.Ct. 1173 (1978) cited by Justice Brennan in *Cuyler v. Sullivan*, 446 U.S. 351, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980).

Whitney called his retained Attorney Mr. Bienert on January 10, 2003. Mr. Bienert told Whitney that he could not represent him at trial scheduled to begin on January 21, 2003, because of a calendar conflict. (ER 368.)

January 14, 2003, Whitney met with Mr. Bienert at his office. Whitney told him that he wanted to move to continue the trial to enable Mr. Bienert time to prepare, (ER 368-369.) As stated earlier Mr. Bienert had already prepared a trial outline and a trial memorandum. (ER 437.) Mr. Bienert was also conferencing with the AUSA (ER 435) – Mr. Bienert refused to file a continuance because co-defendant Hudson's attorney, Mr. Miller, was ready to go to trial.

Mr. Bienert's failure to act may not be viewed as a sound trial strategy. Mr. Bienert's failure to file a continuance as requested by Whitney was ineffective assistance of counsel. Whitney was prejudiced by Mr. Bienert's failure to act.

Whitney was forced to trial without counsel, the trial outline, trial memorandum or any other work in progress Mr. Bienert had prepared for trial. Mr. Bienert's actions are grounds for an ineffective assistance of counsel claim by Whitney. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). A defendant claiming ineffective assistance of counsel must demonstrate, in light of all circumstances, that: (1) his counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) defendant was prejudiced as a result. Whitney has met the two-prong *Strickland*, test. Whitney's Sixth Amendment Rights were violated by Mr. Bienert's relationship with Mr. Miller as explained in *Glasser v. United States*, 75, 86 L.Ed. 680, 62 S.Ct. 457 (1942);

> "Indeed, the evidence of counsel's struggle to serve two masters [could not] seriously be doubted."

Under Rule 44(c), an inquiry is called for when the joined defendants are represented by the same attorney and also when they are represented by attorneys "associated in the practice of law." The Code of Professional Responsibility Disciplinary Rule 5-105(D):

> "a lawyer is required to decline employment or to withdraw from employment" because of a potential conflict, "no partner or associate of his or his firm may accept or continue such employment."

Furthermore, ABA Standards Relating to the Defense Function § 3.5(b) (Approved Draft 1971) applicable to: "a lawyer or lawyers who are associated in pratice." Attorneys representing joined defendants should so advise the court if they are associated in the practice of law.

Mr. Bienert, Mr. Wiechert, Mr. Miller and Mr. Steward failed to notify the court of their association in the practice of law.

The Ninth Circuit finding citing the January 8, 2001, status conference as its authority;

> "Viewing the record as a whole, Whitney's waiver was knowing and intelligent."

This finding belies the reality of the court record. Whitney made it unequivocally known to the court he had no intention of representing himself Whitney stated: "because I know its foolish." Whitney informed the district court on a number of occasions he will be retaining Mr. Thomas Bienert and Mr. David Wiechert as his counsel.

April 30, 2001, Whitney retained Mr. Bienert and Mr. Wiechert. Mr. Bienert on the record informed the court at the July 23, 2001, status conference "he had been retained."

The Ninth Circuit finding, "Viewing the record as a whole, Whitney's waiver was knowing and intelligent." The Ninth Circuit finding fails.

January 8, 2002, the district court judge, in chambers appointed panel Attorney Mr. Kenneth M. Miller to represent Whitney's co-defendant. This is the bright line or moment the conflict was created. The district court judge had the courts record showing Mr. Dean Steward, Mr.

Miller's law partner, had represented Whitney in the present case. The district court by the judges own acknowledgement – later stated at sentencing all four attorneys, Mr. Bienert, Mr. Wiechert, Mr. Miller and Mr. Steward were well known to the court. Therefore when Mr. Bienert informed the court on July 23, 2001, "he had been retained." On January 8, 2002, the court should not have appointed Mr. Miller to represent Whitney's co-defendant. Also the court should not have appointed Mr. Miller on January 8, 2002, because the court record reflected Mr. Miller's law partner, Mr. Steward, had represented Whitney in the present case.

The obligation placed upon the court by Rule 44(c) is a continuing one, and thus the district court was required to review for a potential conflict of interest before appointing Mr. Miller to represent Whitney's co-defendant. *See United States v. Carrigan*, 543 F.2d 1053 (1976):

> " . . . the trial court should conduct a hearing to determine whether conflict exist to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment, and defendants should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express their views."

The district court abused its discretion by failing to properly inquire before appointing Mr. Miller. The district court had a duty to conduct a hearing to determine whether conflict exists to the degree Whitney's Sixth Amendment Rights would be violated. The Ninth Circuit's finding Whitney's waiver was knowing and intelligent fails because the district court created the conflict and;

> "Where trial court made no inquiry as to possible conflict of interest, so that it could not be said that choice of counsel by either defendant was intelligently made with knowledge of any possible conflict" *United States v. Carrigan,* 543 F.2d 1053 (1976).

The first day of trial the district court was obligated to conduct a Rule 44(c) inquiry – since such inquiry is a continual one and considering the critical stage, the trial.

The Constitution or *Faretta*, do not compel a specific colloquy, Supreme Court authority does mandate that the district court, at a minimum, inquire that the defendant understands the dangers and disadvantages of self representation and the importance of counsel at that particular point of the proceedings. *Faretta v. California*, *supra*, 422 U.S. at 835; *Patterson v. Illinois*, 487 U.S. 285, 298, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988).

During the *Faretta* colloquy, the district court failed to ascertain whether or not Whitney's waiver of counsel was knowingly and intelligently made because it did not inquire if Whitney understood the dangers and disadvantages of self representation. Supreme Court authority mandates that the courts conduct this minimal standard of questioning. *Faretta v. California, supra*, 422 U.S. at 835.

In addition, the reviewing court was required to take into account the stage in the criminal proceedings. The trial judge is under an unambiguous duty to make the defendant aware of the usefulness of counsel to the accused at the particular proceeding, and the dangers . . . of proceeding without counsel *Patterson v. Illinois, supra*, 487 U.S. at 298.

Whitney was waiving counsel at a criminal trial. In order for that waiver to be intelligently and knowingly made, The *Faretta*, colloquy was required to be tailored to the dangers of self-representation during a criminal trial. In the present case, the trial judge was obligated to address in a hearing the conflicted attorneys and the *Carrigan* issue before he conducted a *Faretta* hearing.

In the present case, the record demonstrates that the district court did not fulfill its duty under *Faretta,* and its obligation to abide by Rule 44(c) was simply ignored.

Justice Stevens, in his opinion in *Mickens v. Taylor*, 535 U.S. 162, 185 L.Ed.2d 291 (2002), cites the duty of the trial judge, on the first day of Whitney's trial:

> "At that point in the proceeding by definition, the defendant has no lawyer to protect his interest and must rely entirely on the judge. For that reason it is "The solemn duty of . . . a judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of his constitutional right at every stage of the proceedings."

Von Moltke v. Gillies, 332 U.S. 722, 68 S.Ct. 316 (1948).

Whitney had unequivocally informed the trial court Mr. Bienert and Mr. Wiechert would be representing him and he had no intention of representing himself. Mr. Bienert in fact informed the court "he had been retained." This very court and judge presided over the SEC Civil case against Whitney – Whitney was represented by counsel in that case. The court ruled as to Whitney in the SEC trial the government had not proven its case, as for Whitney's co-defendant's in the SEC trial they were found guilty, the

SEC case was repackaged into the present criminal case and labeled as mail fraud.

In the present case the trial court instructed the government as to Whitney retaining counsel to:

> "monitor the situation and to schedule a status conference if the situation remained unresolved in a couple of month's, I want to make sure we don't have a delay in the trial."

(RT [1/8/2001] 29, GER 61.)

Mr. Bienert informed the court on July 23, 2001, "he had been retained." AUSA Mr. Douglas McCormick and AUSA Mr. Kenneth Jullian never raised any concern to the court concerning Whitney's representation after July 23, 2001, because they knew as the court record attested Mr. Bienert, "he had been retained." As stated earlier before sentencing, Whitney retained expert witness Attorney Mr. Boyd S. Lemon to review the events and determine whether the attorneys had a conflict of interest. Whitney filed in the district court Mr. Lemon's opinion and declaration, Whitney also filed for the record his retainer agreement with Mr. Bienert and Mr. David Wiechert, billing statements from Mr. Bienert and a Title document for the office building transaction of Mr. Thomas Bienert, Mr. David Wiechert, Mr. Kenneth Miller and Mr. Dean Steward.

Mr. Bienert's billing records confirm he was conferencing with the AUSAs and billing Whitney's trust account as he was preparing for trial.

The courts instruction of January 8, 2001, to the government to "monitor the situation . . . ", therefore was not an issue. Days before the start of trial AUSA Mr.

McCormick and AUSA Mr. Kenneth Jullian submitted a trial brief instructing the trial court it should conduct a *Faretta* hearing. The day of the trial the government changed their position and informed the court;

> "we don't think there is a need for you to do a formal *Faretta* hearing this morning as we sit here and wait for the jury to enter the courtroom."

Whitney found himself in a situation not of his own making, the first day of trial without counsel. Whitney's retained "lawyers violation of his fundamental obligation of disclosure is indefensible." *Mickens*, at 182.

Whitney's retained attorney's refusal to file a continuance as requested by Whitney is not only a *Strickland*, violation it also made it "difficult, if not altogether impossible, to establish the necessary level of trust that should characterize the "delicacy of relation" between attorney and client", needed for a criminal trial. *Mickens*, at 180, 181.

Whitney had been warned by the trial court;

> " . . . that it would not postpone the trial so a newly-retained attorney could prepare, Whitney informed the court he understood"

(RT [1/8/2001] 14; GER 27.)

Whitney found himself in a situation as stated in his declaration that he had to represent himself.

Whitney equivocally informed the court the first day of trial "No, I just simply decided that I would represent myself." Whitney was not aware the court had created the

conflict until after the trial before sentencing when Whitney retained expert witness Attorney Boyd S. Lemon.

The events of the first day of trial should have caused the court to pause regarding Whitney, " . . . and to take all steps necessary to insure the fullest protection of his constitutional right at every stage of the proceedings." for that is "The solemn duty of a judge . . . " *Von Moltke*, 332 U.S. at 722, 68 S.Ct. 316.

The Ninth Circuit Ruled in Whitney's case;

> "An actual conflict is one "That affected counsel's performance as opposed to a mere theoretical division of loyalties"

Mickens v. Taylor, 535 U.S. 162, 171 (2002).

Not only is the Ninth Circuit's ruling on the issue of conflict of interest in Whitney's case misguided, it appears the court of Appeals failed to grasp the teachings of *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

The Ninth Circuit addressed in their ruling the government's argument that there can be no finding of inadequate assistance of counsel if we hold that Whitney waived his right to counsel: "that once the Sixth Amendment is waived, it cannot be violated." *C.F. Robinson v. Ignacio*, 360 F.3d 1044, 1056 (9th Cir. 2004). The Ninth Circuit correctly found the government's argument unpersuasive. "Counsel must meet Constitutional requirements prior to a defendant's waiver if the Sixth Amendment has attached." *C.F. Robinson*, 360 F.3d at 1059 (holding that Constitution protected right to counsel at sentencing even where it was waived at trial).

Whitney argues the Ninth Circuit is correct yet misplaced. Whitney's retained counsel Mr. Thomas Bienert began representing Whitney during pre-trial, that is when the *Strickland*, prejudice occurred. Whitney's Sixth Amendment rights were violated when Mr. Bienert failed to file a continuance, as requested by Whitney, because co-defendant's attorney, Mr. Miller, was ready to go to trial.

On the day of the trial, Whitney made an equivocal waiver of counsel. The trial judge at that moment had a solemn duty to insure the fullest protection of Whitney's Constitutional right at that stage of the proceedings. *Von Moltke.*

Whitney was denied assistance of counsel during a critical stage of the proceeding, his trial. *United States v. Cronic*, 466 U.S. 648 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) teaches;

> "of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it effects his ability to assert any other rights he may have."

Whitney is able to "demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "*Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674. Before the instant criminal case the SEC filed a Federal Civil case against Whitney and his co-defendant's. The SEC case was heard before the same trial court as the instant criminal case, Whitney was represented by counsel in the SEC case in said case the court ruled the government had not proved its case against Whitney. In the SEC case, the court ruled against Whitney's co-defendants.

After the SEC case and before the instant criminal case, a second civil action was brought against Whitney and his co-defendants in Orange County Superior Court, Whitney again was represented by counsel. The Superior Court found Whitney's co-defendants had committed fraud as for Whitney the charges were dismissed by the court.

Both civil cases had a lower standard of proof than required in the instant criminal case.

Whitney meets the *Sullivan*, test cited in *Mickens*, at 163;

> " . . . a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief," *Sullivan*, 446 U.S. at 349-350, 100 S.Ct. 1708.

As stated earlier Mr. Bienert's failure to comply with Whitney's request for him to file a continuance is not supportive of sound trial strategy and meets the test of a conflict since Mr. Bienert's refusal to file, was based on the fact Whitney's co-defendant's attorney, Mr. Miller, was prepared for trial and did not want a continuance.

The Ninth Circuit ruling regarding Mr. Bienert, "a mere theoretical division of loyalties", does not show a violation. The Ninth Circuit ruling fails.

The record attested to the fact Mr. Bienert provided ineffective assistance of counsel and was laboring under a conflict of interest of which he was obligated to disclose not only to Whitney, but he was also obligated to disclose his conflict to the court.

The finding by the Ninth Circuit as to Whitney's first attorney, Mr. Dean Steward, simply ignores statutes, Federal Rule 44(c), and established case law.

a. Whitney self reported to United States District Court as instructed by the Postal Inspector, the procedure or sequence of events to come were unknown to Whitney.

b. Whitney was processed and placed in a cell and asked if he had counsel? Whitney, responded, "No", and was informed counsel would be appointed by the court.

c. Whitney was chained and handcuffed, Mr. Steward informed Whitney he would be representing him.

d. Whitney stated in the declaration he filed with the District Court; Whitney in fact disclosed the "Merits" of his case with Mr. Dean Steward. Only at the end of the Preliminary hearing did Whitney and Steward, discuss the next court hearing, at that time Whitney informed Mr. Steward he was able to retain counsel. That is when Mr. Steward wrote down and gave Whitney the names of Mr. Bienert and Mr. Wiechert and two other attorneys.

e. The Ninth Circuit and Mr. Steward acknowledge that Mr. Steward represented Whitney, yet they brush the Preliminary hearing off as if it were a "social event" – Whitney "lost his liberty that day" and was very concerned his court appointed Attorney Mr. Dean Steward understood the "Merits" of Whitney's case.

Mr. Dean Steward was appointed counsel under statutory authority 18 U.S.C. § 3006A. Mr. Steward was

obligated to inform his law partner Mr. Miller he could not represent Whitney's co-defendant because he, Mr. Steward had represented Whitney in the very same case. Mr. Steward was obligated to alert the court of the conflict and inform Whitney of the conflict. Mr. Dean Steward simply chose to remain silent in direct violation of the ethical standards set out by the ABA, and FRCP Rule 44(c).

The District Court abused its discretion by not holding an evidentiary hearing into the conflict the attorneys were laboring under. The record is barren of the trial court performing a satisfactory judicial inquiry regarding the attorneys' conflict of interest. Due to the court's failure to properly inquire into the conflict of the attorneys the burden of proof on the question of prejudice shifts to the Government. *See Carrigan*, 543 F.2d at 1054.

Structural error – the entire framework within which Whitney's trial proceeded – not only denied Whitney of his right to counsel of choice and his Sixth Amendment guarantee of fairness, Whitney was also denied the assistance of counsel for his trial. This Honorable Court recently decided on June 26, 2006 in: *United States v. Gonzalez-Lopez*, ___ U.S. ___, No. 05-352, 6/26/06 held:

> "A trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to reversal of his conviction."

The district court failure to follow Federal Rules of Criminal Procedure, Rule 44(c), when the court appointed panel attorney, Mr. Miller, to represent Whitney's co-defendant, denied Whitney of his retained counsel of choice Mr. Bienert and Mr. Wiechert. This Honorable Court has decided in *Gonzalez-Lopez*:

> "A choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied."

This Honorable Court now holds erroneous denial of right to counsel of choice is 'Structural' Sixth Amendment error subject to automatic reversal. Whitney has suffered such a denial.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, Ninth Circuit in this case. The Ninth Circuit has rendered a decision in conflict with this Honorable Court, and with other United States court of appeals on the same matter. The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision in order to maintain the public trust in federal trials and the protection of Whitney's Sixth Amendment rights.

Dated: August 31, 2006

Respectfully submitted,

MICHAEL S. WHITNEY
Petitioner – Pro Se
A4C-17319-112
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APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL SYLVESTER WHITNEY, Defendant-Appellant.	No. 05-50323 D.C. No. CR-00-00024-GLT-3 MEMORANDUM* (Filed May 12, 2006)

Appeal from the United States District Court for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted April 4, 2006**
Pasadena, California

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

A. Waiver of Counsel

Whitney claims that in order for a waiver to comply with the Sixth Amendment, the district court must find that a defendant has knowledge of three subjects: the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

nature of the charges, the possible penalties, and the dangers of self-representation. However, the en banc decision in *Lopez* clarified that while the Court prefers that these elements be given, they are not required by the Constitution. *Lopez v. Thompson*, 202 F.3d 1110, 1117-19 (9th Cir. 2000) (en banc).

Viewing the record as a whole, Whitney's waiver was knowing and intelligent. The waiver occurred on the first day of trial, since that is when Whitney conclusively invoked his right to proceed pro se. Prior to trial, he had been warned at six hearings spanning almost three years about the dangers of delay and the need for counsel. The district court gave a lengthy and detailed warning at the January 8, 2001 status conference, and inquired several times into Whitney's educational background and sophistication. Additionally, Whitney had previously been prosecuted by the SEC and litigated a case in state court raising the same general issues, making him aware of the general nature of the charges. He had witnessed his counsel's performance and responsibilities. Whitney was made aware of the dangers and disadvantages of self-representation.

B. Sufficiency of Evidence on Specific Intent

Whitney argues that he lacked the specific intent either to defraud customers or to aid and abet the underlying scheme.

"When determining whether there is sufficient evidence to support a conviction, we review the evidence in the light most favorable to the prosecution and affirm if any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." *United States v. Serang,* 156 F.3d 910, 914 (9th Cir. 1998).

"The elements of mail fraud under 18 U.S.C. § 1341 are: (1) the existence of a scheme to defraud, and (2) using or causing the use of the mails to further the scheme." *Id.* at 914. "[T]he government must prove a specific intent to defraud." *United States v. Sayakhom,* 186 F.3d 928, 941 (9th Cir. 1999). "Intent . . . may be inferred from the defendant's statements and conduct. Deceitful statements of half truths or the concealment of material facts is actual fraud under the mail fraud statute." *Id.* (citation and quotation marks omitted). Aiding and abetting requires a specific intent to facilitate the underlying crime. *United States v. Sayetsitty,* 107 F.3d 1405, 1412 (9th Cir. 1997).

There is evidence that Whitney knew from the beginning that the company was not acquiring or boarding birds for its customers, yet he continued to sign persons to sales contracts. He sent out boarding invoices for non-existent birds, collected the money, and spent it. He reassured customers that there were no problems, both by sending the boarding invoices and by addressing their complaints and concerns directly. *Compare United States v. Manarite,* 44 F.3d 1407, 1412 (9th Cir. 1995) (discussing use of mails for "lulling scheme," in which "the mailing reassures the victim that all is well, discouraging him from investigating and uncovering the fraud"); *cf. United States v. Maze,* 414 U.S. 395, 403 (1974) (discussing the fraudulent nature of mails "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place"). Nothing more was required.

C. Exclusion of Evidence

"To evaluate whether exclusion of evidence reaches constitutional proportions, we should consider five factors: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense." *Tinsley v. Borg,* 895 F.2d 520, 530 (9th Cir. 1990). "We must then balance the importance of the evidence against the state interest in exclusion." *Id.*

Whitney wished to introduce evidence of the civil case to support his defense that he was duped by the co-defendants, and would have paid the customers back before the indictment except that the civil case prevented him. The Government defends by pointing to a joint stipulation, which states: "The indictment . . . was filed on March 8th of 2000; 2. A civil suit brought by investors against The Ostrich Group and Michael Whitney was concluded on September 27, 2000."

Whitney fails to show that any excluded evidence would have constituted a major part of his defense. He also wished to introduce evidence that he survived summary judgment in his SEC action, unlike his co-defendants, and that he eventually settled with the SEC without admitting any wrongdoing. He also wanted to show that his settlement was for $23,000, whereas his co-defendants paid $819,000.

Such evidence was properly excludable under Federal Rule of Evidence 408 as an offer to compromise offered for the validity of the underlying claim. Fed. R. Evid. 408. As

the comments to Rule 408 note, "the offer may be motivated by a desire for peace rather than from any concession of weakness of position." Fed. R. Evid. 408 advisory committee's note. Any possible probative value was outweighed under Rule 403 by the distraction it would have caused the jury.

D. *Brady* Violation

There are three elements to a *Brady* claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks v. Dretke,* 540 U.S. 668, 690 (2004) (internal quotations omitted). Prejudice is determined by examining the cumulative impact of the evidence. *See United States v. Sarno*, 73 F.3d 1470, 1505 (9th Cir. 1995). "We review allegations of *Brady* violations de novo." *United States v. Danielson,* 325 F.3d 1054, 1074 (9th Cir. 2003).

Whitney claims that the prosecution improperly failed to reveal that one of its investigators had spoken with Edward Gogin, a Certified Public Accountant who had assisted The Ostrich Group, prior to the case.

There was no *Brady* violation. The statements were not suppressed and they were immaterial. Gogin's letter states that he had previously told Whitney everything he had told the inspector. The Government's theory was that Whitney made misstatements to customers; his presence in accounting meetings is irrelevant to this theory.

E. Attorney Conflict of Interest

An actual conflict is one "*that affected counsel's performance* – as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor,* 535 U.S. 162, 171 (2002). The Court reviews such claims de novo. *Lambert v. Blodgett,* 393 F.3d 943, 985 (9th Cir. 2004).

The Government initially argues that there can be no finding of inadequate assistance of counsel if we hold that Whitney waived his right to counsel; that once the Sixth Amendment is waived, it cannot be violated. *Cf. Robinson v. Ignacio,* 360 F.3d 1044, 1056 (9th Cir. 2004).

The Government's argument is unpersuasive. Counsel must meet constitutional requirements prior to a defendant's waiver if the Sixth Amendment has attached. *Cf. Robinson,* 360 F.3d at 1059 (holding that Constitution protected right to counsel at sentencing even where it was waived at trial).

Whitney points to two conflicts. First, he claims that Attorney Stewart, who acted on special appointment at his special appearance and bail hearing, later became partners with Attorney Miller. In turn, Miller later was appointed counsel for co-defendant Hudson. Hudson and Whitney blamed each other, so Whitney contends that the partnership could not represent both without conflict.

Whitney's claim fails. Stewart faced no conflicts at the time he made his appearance, because he was not yet associated with Miller. Stewart also testified that Whitney understood that Stewart was not his attorney, and that

Stewart had received no confidential information. Furthermore, Whitney does not demonstrate any adverse effect.[1]

Whitney claims that Bienert, Miller, Stewart, and a fourth lawyer, Wiechert, were effectively law associates because their offices were adjacent, they shared a paralegal, and they sought to buy a building together. However, merely sharing office space does not establish joint representation for Sixth Amendment purposes. *See Lambert,* 393 F.3d at 986-87. Whitney also identifies no adverse effect on Bienert's representation. Whitney mentions the possibility that Bienert's advice could have been tainted, but "a mere theoretical division of loyalties" does not show a violation. *Mickens,* 535 U.S. at 171.

F. Guidelines

"[We] review[] the district court's interpretation of the Sentencing Guidelines de novo, the district court's application of the Sentencing Guidelines to the facts of this case for abuse of discretion, and the district court's factual findings for clear error." *United States v. Menyweather,* 431 F.3d 692, 697 (9th Cir. 2005) (citation omitted).

The district court applied U.S.S.G. § 1B1.3(a)(1) (Nov. 1995) to hold Whitney accountable for all of the losses that occurred after Whitney joined The Ostrich Group (a total of $567,767). This provision provides that a defendant is responsible for:

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[1] While Whitney claims that the court, upon appointing Miller counsel, should have made a Federal Rule of Criminal Procedure 44(c) inquiry, he fails to analyze what effect a failure to inquire would have on the Sixth Amendment.

> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. . . .

U.S.S.G. § 1B1.3(a)(1).

The district court adopted the PSR, which described the scheme and Whitney's involvement in detail. *See United States v. Ortiz*, 362 F.3d 1274, 1277 (9th Cir. 2004) (holding that district court may find facts to support both factors by adopting PSR). Additionally, the district court specifically found that the losses were foreseeable by Whitney.

G. Due Process Violation in Sentencing

Whitney claims that the Fifth Amendment requires judges to find all Guidelines facts that raise the sentence above the base level justified by the jury's findings beyond a reasonable doubt.

In *United States v. Booker*, 543 U.S. 220 (2005), the Court did not address the applicable burden of proof for judge-found facts under a non-mandatory guidelines

scheme.[2] The Court has already remarked post-*Booker* that "[a]s a general rule, the preponderance of the evidence standard is the appropriate standard for factual findings used for sentencing." *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2005) (rejecting higher standard for judicial factfinding that raises a statutory mandatory minimum). *Booker* did "not foreclose judicial factfinding in the sentencing context, nor [did it] dictate that judges must find those facts beyond a reasonable doubt." *United States v. Bryant*, 420 F.3d 652, 656 (7th Cir. 2005).

AFFIRMED.

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[2] Despite Whitney's argument to the contrary, *Booker* does apply to this proceeding. *See United States v. Dupas*, 419 F.3d 916, 920-21 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1484 (2006).

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL SYLVESTER WHITNEY, Defendant-Appellant.	No. 05-50323 D.C. No. CR-00-00024-GLT-3 Central District of California, Santa Ana ORDER (Filed Jun. 21, 2006)

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judges Farris and Fernandez so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

APPENDIX "C"

AMENDMENT VI OF THE UNITED STATES CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FEDERAL RULE OF CRIMINAL PROCEDURE 44(c) PROVIDES:

Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.